KADC

Summer 2009

Kansas Defense Journal

Inside this issue of *Kansas Defense Journal:*

COMPARATIVE IMPLIED INDEMNITY, THIRD-PARTY PRACTICE AND SETTLEMENT CONSIDERATIONS IN THE WAKE OF *DCI* PART I

INTRODUCTION

The Kansas Supreme Court's recent ruling in *Dodge City Implement, Inc. & Slattery v. Bd. Of County Comm'rs & Moore Township,*[1] (hereinafter "*DCI*") provides important guidance for defendants and their counsel who find themselves involved in multi-tortfeasor cases. It reinforces prior guidance on settling a case in which more than one party may have caused damages to the plaintiff. However, the Court's ruling suggests a resurgence of the importance of the one action rule, which, in turn has clear implications for attorneys and their clients as they attempt to pursue settlement possibilities. This article will summarize the ruling in *DCI* and the cases leading up to it, and discuss the practical aspects of settling multi-tortfeasor cases in a post-*DCI* world.

Mark D. Katz
Sherman Taff
Bangert Thomas & Coronado, P.C.

Lawrence E. Nordling
Sherman Taff
Bangert Thomas & Coronado, P.C.

OVERVIEW OF *DCI*

DCI involved a collision between a Burlington Northern and Santa Fe (BNSF) freight train and a truck owned by Dodge City Imple-

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LOOKING AHEAD TO THE FALL ISSUE

Part II of the above article will focus on the primacy given to the one action rule by the Kansas Supreme Court's holding in *DCI*, and discuss the Court's reasoning in confirming that such rule remains alive and well.

KADC MEMBER WEN WURST APPOINTED TO BENCH

Governor Mark Parkinson has appointed KADC member Wendel W. Wurst of Garden City, Kansas, as district court judge for Kansas' 25th Judicial District. The appointment, made on Friday, July 23, 2009, follows the retirement of former district judge, Thomas F. Richardson, in April of this year. Richardson had served 14 years. Wurst was one of two candidates selected by the 25th Judicial Dis-

trict Nominating Commission and recommended for potential appointment to Governor Parkinson in June. The 25th Judicial District is a retention district.

"I am honored to have been selected to serve as one of the Twenty-fifth Judicial District Judges and hope to serve the district well," Wurst commented.

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NEWSLETTER EDITOR
Kansas Defense Journal is a quarterly publication of the Kansas Association of Defense Counsel. If you have any questions, comments, or ideas for future articles, please contact the *Journal*'s editor:

Amy E. Morgan
Polsinelli Shughart
6201 College Blvd
Suite 500
Overland Park, KS 66211
Phone: 913-234-7512
Fax: 913-451-6305
Email: amorgan@polsinelli.com

KADC
825 S. Kansas Avenue, Ste 500
Topeka, KS 66612
785/232-9091
Fax: 785/233-2206
www.kadc.org

PRESIDENT'S MESSAGE

David A. Rameden
Shook, Hardy & Bacon LLP

Dear KADC Friends,

We held our **Mid-Year Meeting** in Wichita on May 15, including a wonderful CLE on Cross Appeals presented by **James Oliver** of the Foulston firm, a very interesting CLE on Trade Secrets litigation presented by **Tom Buchanan** of McDowell Rice, and a presentation by yours truly on Ethics in Settlement and Mediation. The program was well received by those in attendance and sparked lively discussion during and afterwards. Thank you, James and Tom. We will be scheduling another Mid Year Meeting in 2010 during the River Festival in Wichita. Mark your calendars now (May 14, 2010) and we hope to see all of you there next year!

KADC hosted a member breakfast during the KBA Annual Meeting on June 18 in Overland Park. House Speaker and KADC member **Mike O'Neil** provided an overview of the past legislative session and discussed the fiscal crisis facing the Kansas Judicial Branch (see below). Before the breakfast, the KBA presented Mike with a ceremonial gavel in recognition of his service as Speaker. Congratulations, Mike, and thanks for sharing your time with us.

The planning for our 2009 Annual Meeting (December 4-5) is coming along very nicely, thanks to program chair, **Jim Robinson.** We will be back at the Hyatt Regency in the Crown Center this year. We are tentatively planning something new this year – a Friday evening dinner, with entertainment from **Sean Carter** ("America's Funniest Lawyer"), as well as a live band and dancing. We hope you will bring your spouses or other guest for what promises to be a great evening to socialize and network. Other programming will include two hours of entertaining (yes, I said entertaining) ethics CLE by Mr. Carter as well as a much-heralded presentation on jury selection by **US District Judge Tom Marten**. This is a must-attend event. Preciously guard those dates on your calendar. Look for more details in the coming weeks.

Have you checked out the KADC website recently? A recently-added feature is a brief synopsis of the unpublished Kansas appellate cases that KADC emails you every week. After last issue's call for volunteers, **Jackie Sexton** of the Foland Wickens firm stepped up and offered to prepare summaries of these cases each week. Jackie is being ably assisted by **Liam Logan** of the same firm. These summaries offer you the chance to see what is happening in the Kansas courts, without reading the entire case. I highly recommend that you bookmark "Jackie's page" on the website (http://www.kadc.org/Members/Opinions/09%200pinions/090pinons.htm) and make a weekly visit. In two to three minutes you can learn about "hot" cases that might affect your practice. Thanks, Jackie and Liam!

KADC's amicus efforts were recently acknowledged by the Kansas Supreme Court in *Williams v. Lawton*, 207 P.3d 1027 (2009). There, the Kansas Supreme Court reversed the Court of Appeals misapplication of Supreme Court Rule 169 and reconfirmed the propriety of attorneys interviewing jurors after trial, without prior consent of the trial

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KADC AMICUS COMMITTEE REPORT

Todd N. Thompson
Thompson Ramsdell & Qualseth, P.A.

The KADC celebrates a victory – post-trial juror contact upheld.

As previously reported in this column, the KADC filed an amicus brief in *Williams v. Lawton*, a medical malpractice case dealing with post trial contact with jurors, and involving a challenge to a verdict based on alleged juror misconduct. I am pleased to report that the KADC was successful in its effort to uphold the practice of post-trial interviews of jurors without court approval.

The Kansas Supreme Court issued an opinion in late May (http://www.kscourts.org/Cases-and-Opinions/Opinions/supct/2009/20090529/97132.htm) in which it specifically took note of the KADC's argument that post-verdict communication with jurors educates and assists attorneys in the improvement of trial techniques, and is a valuable educational tool. The Court noted that "these points are well taken." Congratulations and our thanks to Shannon Holmberg and Andrew Marino of Gilliland & Hayes, P.A. for drafting the amicus brief, and for succeeding in preserving the right to talk to jurors after the verdict is rendered.

Ex parte communications with medical care providers – Ruling expected soon.

Oral arguments were held in *Foster v. Klaumann, M.D.*, No. 100286, on June 2nd at the Butler County Courthouse in El Dorado. The case involves a challenge by a minor personal injury plaintiff and her parents to *ex parte* communication between defense counsel and the plaintiff's treating physician. As of the time this column is completed an opinion has not yet been issued. The ruling should be forthcoming soon, however.

Caps on non-economic damages – Briefs are in; oral argument not yet set.

Briefing concluded in mid-June in *Miller, et al. v. Johnson*, No. 99818, one of two medical malpractice cases in which the KADC is *amici,* and which raise constitutional challenges to the KSA 60-1903 and 60-19a02 caps on non-economic damages. Tim Finnerty, of Wallace, Saunders, Austin, Brown & Enochs, Chtd, who authored the KADC briefs, reports that reply briefs filed by the appellants correctly noted that the *Samsel* decision did not address two of the current constitutional grounds for attacking the caps, equal protection and separation of powers, and that *Samsel* should not, therefore, be seen as dispositive. However, Tim indicates that there was no elaboration on why the Court should not exercise the same restraint on these constitutional grounds as was previously shown as to the issues that were addressed in *Samsel* (right to jury trial and due process). Nor did the appellants address how the caps could be considered a "clear" violation of constitutional guarantees.

Amici KMS-KHA and KCC took aim in their briefs at both the economic and legal policy arguments that warrant maintaining the *status quo* of the current caps, including affordability of, and access to, health care, and predictability of business risks. In response to the KMS-KHA and KCC arguments, the appellants, through the Center for Constitutional Litigation, P.C., a Washington, D.C. based law firm, cited academic and other studies contending exaggeration or lack of evidence for the *amici's* concerns.

If any member has a request for amicus support, please contact me by phone at (785) 841-4554, or via e-mail at tlegal@aol.com. ▲

ARE YOU ENROLLED IN THE KADC LISTSERVE?

Membership in KADC offers you a moderated, secure listserve where you can exchange information with your peers regarding expert witnesses and other issues. It offers an invaluable way to reach out to the almost 250 members of KADC.

To join your KADC list serve go to http://groups.yahoo.com/group/kadclistserve/ and click the "Join this Group" button or email Brandy Johnson at brandy@kadc.org and she will add you to the group.

WELCOME NEW KADC MEMBERS

William Bahr
Arthur-Green LLP

Larry Nordling
Sherman Taff Bangert Thomas & Coronado, P.C.

Ryan Weltz
Wallace Saunders Austin Brown & Enochs Chrtrd

John Woolf
Triplett Woolf & Garretson LLC

EXECUTIVE DIRECTOR'S REPORT

Scott Heidner
Executive Director

Greetings from KADC HQ! I hope you are having a great summer full of vacations and family adventures. Summer for KADC is, to some degree, the eye in the center of the storm. We are a few weeks removed from the legislative session, and a few weeks away from the time when planning for the Annual Conference kicks into overdrive. With that in mind, I want to talk about something that we probably do not promote as effectively as we should.....becoming active within KADC.

If you are reading this, you are already a member of KADC. (Thank you for your support!) You probably also know that serving on the Board of Directors is one way to contribute to the success of the organization. There are many other ways to get involved, however, that are just as important. These efforts are critical to the success of KADC, and, if you ask anybody currently working on them, a significant value to those that volunteer and participate.

Shon Qualseth (Thompson Ramsdell & Qualseth, Lawrence) chairs the KADC Membership Committee, which was only created within the last two years. Membership is the lifeblood of any professional association. Membership numbers for KADC have hovered between 230 and 240 for many years. The goal of this committee is to boost those numbers. The committee has several plans that they have executed or at least considered, including addressing law students, making presentations to the leadership of firms that are under-represented in KADC, and attending events of other stakeholder groups to help spread the word about the value of KADC membership. They have more ideas than time, but would welcome either from other KADC members.

Amy Morgan (Polsinelli Shughart, Overland Park) is the editor of our newsletter. (And I can personally attest that she does a great job keeping columnists on time and under budget!) Amy is always on the lookout for topics and authors to contribute to the newsletter. Contacting Amy to volunteer is not only a way to help keep quality information in front of KADC members, it's a prestigious opportunity that is a boost to the credentials and career of the author.

Todd Thompson (Thompson Ramsdell & Qualseth, Lawerence) chairs the KADC Amicus Committee. This committee has always been active, but the volume of requests for amicus briefs has increased dramatically in the last two years. Anyone offering to author an amicus brief or serve on the Amicus Committee should contact me, Todd, or a KADC Board member to let us know of your interest. This is an increasingly critical topic. While there is a small stipend available for authors, for the most part this is an opportunity similar to the newsletter...a benefit to the KADC membership, but also a prestigious opportunity that boosts the credentials and career of the author.

David Cooper (Fisher Patterson, Topeka) heads up the team that plans the trial skills workshop that precedes the Annual Conference each year. This workshop provides the same value as similar sessions produced by national companies without the expensive registration fees and travel costs that are normally involved. The workshop has proved to be a dynamic way to get young attorneys involved in KADC activities, and David would welcome an offer to help.

Shifting from the state level to the national level, DRI has numerous committees and task forces that provide unique professional opportunities and produce valuable work product. If you have interest in those, Dan Diepenbrock (Law Office of Daniel H. Diepenbrock, Liberal) is the DRI Representative for Kansas and would be happy to help you get involved in an appropriate area.

These committees and initiatives are the backbone of KADC. The majority of our members have not had the opportunity to participate in these efforts, but I'd ask that you help change that by volunteering for one or more of these groups. The benefit to KADC will be substantial. The benefit to your career and professional development will last forever!▲

TRIAL RESULT!

KADC Member Bill Coates and his co-counsel, Angela Angotti, both of Coates and Logan, LLC obtained a defense verdict on behalf of BNSF Railway Company in April. The trial was brought under the Federal Employers' Liability Act in the United States District Court for the District of Kansas, Magistrate Judge James O'Hara presiding (Docket #: 07-2249).

Plaintiff Shipper was a student engineer trainee who traveled to the Kansas to attend locomotive engineers' school. He was staying in a motel as company-provided lodging. Upon arriving at the motel, he unloaded his motorcycle from his pick-up truck and was moving the motorcycle closer to his motel room when another student engineer backed his vehicle into plaintiff and his motorcycle.

The plaintiff alleged the accident caused aggravation of a pre-existing traumatically-injured arthritic left hip, resulting in total left hip replacement. He alleged $36,000 in past wage loss and $40,000 in future medical expenses.

Plaintiff was represented by William J. McMahon of Hoey & Farina, P.C. from Chicago, IL. Plaintiff's Medical expert was orthopaedic surgeon Tim Bonatus, M.D. of Flagstaff, AZ (videotaped deposition). Defendant's medical expert was orthopaedic surgeon Robert Gardiner, M.D., of Leawood, KS (deposition).

Plaintiff's settlement demand was $50,000.00, and defendant made no offer. Plaintiff settled with the driver prior to trial, but the jury was not advised of the settlement. The jury entered its defense verdict on Wednesday, April 22, 2009.

Congratulations Bill!▲

SHARE YOUR TRIAL RESULTS

with Fellow Members of the
Kansas Association of Defense Counsel

Provide a summary of your trial so that it may be published in the *Kansas Defense Journal*.

Please include the following information:

- Type of Suit
- Case Title
- Court Docket No.
- Attorneys for each party
- Date Decided
- Result
- Significant Holding or Finding
- Liability and Injury Facts
- Verdict or Settlement Amount
- Comments

Email to: Amy E. Morgan, Editor, Kansas Defense Journal
AMorgan@Polsinelli.com

SUMMARY OF RECENT UNPUBLISHED KANSAS APPELLATE OPINIONS

Kansas unpublished opinions are summarized weekly by Jackie Sexton and William F. ("Liam") Logan of Foland, Wickens, Eisfelder, Roper & Hofer, P.C. Thank you Jackie and Liam for providing this valuable service to our membership!

To review summaries of unpublished opinions on a weekly basis, simply open your weekly "KADC Court Opinions" email and click on the link listed on the Unpublished Opinions section: http://www.kadc.org/Opinions.htm. If you are not already receiving weekly emails with court opinions, contact KADC Membership Services Manager Amy Schlink at amy@kadc.org to be added to the distribution list.

August 7, 2009

Rebecca Green v. Linda Brunner, Case No. 100,819 (Kan. App. August 7, 2009)

Brunner appealed the district court's decision granting a final protection from stalking order in favor of Green on June 16, 2008. Brunner claimed the district court should have continued the hearing to allow her to employ an attorney. Green and Brunner appeared pro se at the hearing on June 16, 2008. Brunner informed the judge she had an attorney but her attorney was unavailable because he was from Chapman, Kansas, which had recently been devastated by a tornado. The judge observed that an attorney had not filed an entry of appearance on Brunner's behalf and denied Brunner's request for a continuance. After hearing from both parties, the district court granted the order of protection and prohibited Brunner from having contact with Green for 1 year. The final protection from stalking order expired on June 16, 2009. The general rule is an appellate court does not decide moot questions or render advisory opinions. Regardless, looking to the merits, the granting of a motion for continuance rests within the sound discretion of the district court and will not be disturbed on appeal in

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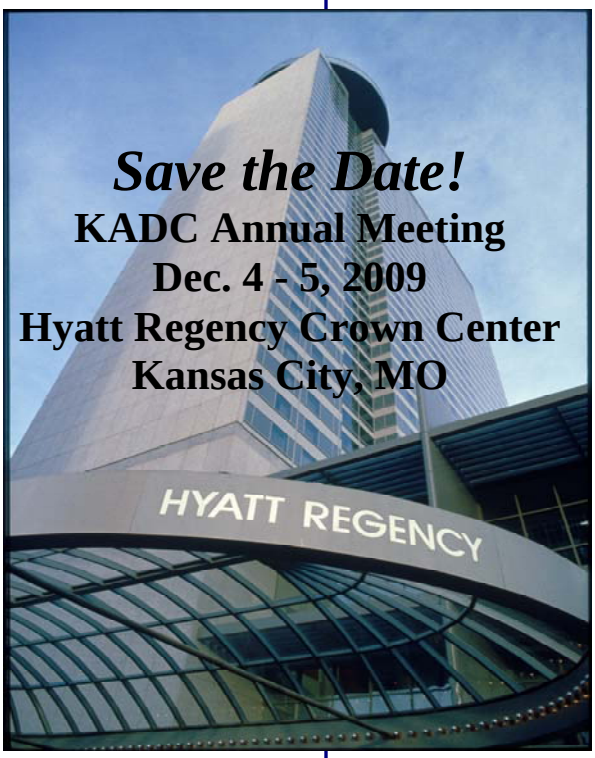

KADC LEGISLATIVE COMMITTEE STAYS ON TOP OF ISSUES OF CONCERN TO OUR MEMBERSHIP!

- Look for your weekly KADC Legislative Bulletin emails during the session
- To review past KADC legislative testimony and other information go to: http://www.kadc.org/Legislation.htm
- For comments or input regarding Kansas legislative issues, contact one of the committee members:

  Jim Robinson: robinson@hitefanning.com

  Anne Kindling: akindlin@stormontvail.org

  Scott Nehrbass: snehrbass@foulston.com

  Pat Murphy: pmurphy@wsabe.com

KADC Member Wen Wurst Appointed to Bench
(Continued from pg 1)

"I truly wish there was an organization for judges which could assist me in performing my new job duties as well as the KADC assisted me in my defense practice. The newsletter, the expert referral network and the annual seminar made me a better lawyer and the association with and camaraderie of the KADC members and directors made my practice a more pleasant and rewarding one."

Wurst was born and raised in Sterling, Kansas. After obtaining his bachelor's degree with honors from Kansas State University, he attended the University of Kansas School of Law, earning his juris doctorate and being admitted to the bar in 1980. He began practicing law in 1980 with the Calihan law firm in Garden City, working in various areas including workers' compensation, and insurance defense. He will be taking the next 60 days or so to close his practice, and is expected to take the bench on October 1.

Wurst has been an active member of KADC for many years, serving on the Board of Directors from 2005 through 2008. He is currently a member of the Southwest Kansas Bar Association, and Kansas Bar Association. In addition, he has been an active community member, serving on the advisory board of the Kansas Rural Legal Services, and the St. Mary School Board. He also sits on the St. Catherine Hospital Board of Directors. Congratulations Wen!▲

President's Message
(Continued from pg 2)

judge, to both search for the truth and integrity of the jury's verdict as well as for educational purposes and improving counsel's trial technique. The KADC amicus brief on this issue was written by **Peter Johnston** and **Dustin Denning** of the Clark Mize firm. The Kansas Supreme Court gave a shout out to their brief and noted their points were "well taken." (**Andrew Marino** and **Shannon Holmberg**, of Gilliland & Hayes, wrote a separate KADC amicus brief on a different issue – expert qualification under KSA 60-3412 – but came in second on that one). Thanks to Peter, Justin, Andrew, and Shannon, and all the others who have volunteered to draft amicus briefs for KADC.

Legislatively, the big news is the effect that Kansas's budget shortfall is having on the Judicial Branch. The legislature, apparently by accident, created a serious multi-million dollar shortfall for the Kansas courts that could result in state-wide furloughs totaling 30 days or more over the next 12 months. One possible outcome is that court employees would be furloughed for up to one week each month, beginning in the first part of 2010, on a statewide basis. See Chief Justice Davis's letter explaining the issue: http://www.kscourts.org/Court-Administration/News-Releases/Revenue-Shortfall-2009.pdf. KADC's **Jim Robinson** has been active in raising awareness among the bar and pressuring the legislature for a solution that avoids furloughs. Mike O'Neil will, of course, be a voice of reason in the legislature on this issue. This is an important issue that affects each of us and our clients.

Do you want to hone your cross examination skills? Then consider attending the Iowa Defense Counsel Association's Annual Meeting on September 17-18, 2009 in Des Moines. If you attended the KADC Annual Meeting in December 2008, you are also entitled to attend IDCA's annual meeting for just the cost of the materials and food (no registration fee!). The featured speaker on Friday, September 18 is nationally-renowned Larry Pozner ("Killer Cross Examination") who will present a full day seminar on cross examination. For more information on the program, please visit:

http://www.iowadefensecounsel.org/files/event/Click_here_for_agenda_and_registration.pdf. **Scott Heidner** can put you in touch with the folks at IDCA regarding your "Mid-Region Discount." Remember, to get this benefit, you must be a current KADC member and have attended our most recent Annual Meeting.

Last, but far from least, KADC member **Wendel Wurst**, of the Calihan Law Firm in Garden City, was recently appointed to be a District Judge for the 25th Judicial District! This continues a fine tradition of KADC members moving to the bench. KADC's loss is Kansas's gain. Congratulations, Wen! Be sure to send Wen your best wishes as he transitions to public service.▲

Comparative Implied Indemnity, Third-Party Practice and Settlement Considerations in the Wake of DCI *(Continued from pg 1)*

The parties entered into a mutual release and settlement agreement whereby DCI and Slattery settled BNSF's claims "against all parties and persons."

ment, Inc.("DCI").[2] BNSF filed suit in Federal Court against DCI and its employee driver, Justin Slattery.[3] The parties entered into a mutual release and settlement agreement whereby DCI and Slattery settled BNSF's claims "against all parties and persons."[4] DCI and Slattery expressly reserved any right they had "to make a claim against or sue Barber County, Kansas, and/or any person or entity, other than BNSF for comparative implied indemnity and any other cause of action that may exist under Kansas law."[5] DCI and Slattery did not seek to join Barber County or the Moore Township either by way of K.S.A. 60-214 or K.S.A. 60-258a.[6]

After the case with BNSF was settled, DCI and Slattery filed suit in State court against Barber County and Moore Township under negligence and implied indemnity theories alleging the county and township had failed to construct and maintain a safe grade crossing.[7] The district judge granted the county and township's motion to dismiss,[8] and the Kansas Court of Appeals affirmed district court's decision.[9]

The Court of Appeals panel held that if a defendant chooses to settle and obtain a release of common liabilities involving other parties whom the plaintiff did not sue, the defendant does not have an action for comparative implied indemnity or post-settlement contribution for damages caused by other tortfeasors.[10] Before the Supreme Court, DCI and Slattery argued they were entitled to seek comparative indemnity against Barber County and Moore Township, even though their fault had not been compared in the federal suit filed by BNSF.[11] For support, DCI and Slattery relied on the holding in *Kennedy v. City of Sawyer,*[12] which adopted a form of comparative implied indemnity between joint tortfeasors.[13]

In examining *Kennedy*, and the subsequent cases which limited the application of *Kennedy* such as *Ellis v Union Pacific R.R. Co.,*[14] and *Teepak, Inc. v. Learned,*[15] the Court found that DCI was actually seeking proportional post-settlement contribution rather than comparative implied indemnity from the county and township. The Court reasoned that the county and township were not subject to liability in the previous action, as DCI had not sought to identify them under K.S.A. 60-258a(c).[16] However, the Court determined that even had DCI and Slattery done so, no cause for comparative implied indemnity would lie, because the purpose K.S.A. 60-258a(c) is to protect a defendant from bearing the entire burden for its nonparty joint tortfeasors, not to impose liability on a joint tortfeasor. Finally, the Court noted even if DCI and Slattery had joined the county and township pursuant to K.S.A. 60-214(a), no claim for comparative implied immunity would lie, because the Court in *Teepak* expressly limited comparative implied indemnity to cases involving indemnification among those in the chain of distribution and rejected the idea that such a claim was available against all joint tortfeasors in all settings.[17]

OVERVIEW OF CASES LEADING UP TO *DCI*

Kennedy

In *Kennedy*, the plaintiffs brought claims against the city and a city councilman after plaintiffs' cattle died from eating weeds sprayed with herbicide by the councilman on behalf of the city.[18] The city filed a third-party petition for indemnity against the manufac-

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Comparative Implied Indemnity, Third-Party Practice and Settlement Considerations in the Wake of DCI *(Continued from pg 8)*

turer of the herbicide, which in turn filed a claim for indemnity under the same statute against the packager of the herbicide;[19] however, the plaintiffs never sought relief against the manufacturer or packager. The district court granted the third-party defendants' motions for summary judgment, and the plaintiffs appealed. While the appeal was pending, the city settled the entire claim with the plaintiffs and obtained a release of all other potentially responsible parties.[20] In an unusual move, the Supreme Court took up the application of comparative negligence principles to the case, *sua sponte*. It reversed the dismissal of the third parties and allowed the city's indemnity action as "a form of comparative implied indemnity," where it held:

> "We conclude that now is the proper time under the facts of this case to adopt a form of comparative implied indemnity between joint tortfeasors. When, as here, a settlement for plaintiffs' entire injuries or damages has been made by one tortfeasor during the pendency of a comparative negligence action and a release of all liability has been given by plaintiffs to all who may have contributed to said damages, apportionment of responsibility can then be pursued in the action among the tortfeasors."[21]

The decision in *Kennedy* was based on the following principles: (1) the concept of joint and several liability between joint tortfeasors no longer applies in comparative negligence actions; (2) contribution among joint judgment debtors is no longer needed in such cases because separate individual judgments are to be rendered; and (3) comparative fault principles are applicable to both strict liability claims and to those claims based on implied warranty in products liability cases.

Ellis

In *Ellis*, four consolidated tort actions were brought against Union Pacific and its engineer for damages arising out of a collision between an automobile and defendants' train, in which three passengers were killed and the driver suffered personal injuries.[22] The defendants joined three governmental entities, pursuant to K.S.A. 60-258a(c); however, the plaintiffs did not amend their pleadings to assert claims against them.[23] The governmental entities moved for a ruling that they were joined solely for purposes of proportional determination of fault,[24] and the motion was granted by the district court.[25] Union Pacific and its engineer settled with the plaintiffs, and the plaintiffs released all parties, including the governmental entities, from all claims or rights of action arising from the collision.[26]

The Court dismissed Union Pacific's claim for implied indemnity or contribution against the governmental entities because no valid claim had ever been asserted by the plaintiffs against those defendants within the time allowed by the applicable statute of limitations.[27] On appeal, the Court commented on the use of the term "comparative implied indemnity," and stated that perhaps "proportional contribution" was more appropriate for the case at bar.[28] The Court explained that Kansas common law does not permit contribution between joint tortfeasors,[29] subject to a limited statutory exception for joint judgment debtors.[30] Thus, a

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Comparative Implied Indemnity, Third-Party Practice and Settlement Considerations in the Wake of DCI *(Continued from pg 9)*

single defendant cannot purport to settle a claim on behalf of all joint tortfeasors and then seek contribution to distribute the loss among other tortfeasors.[31]

The Court in Ellis distinguished Kennedy on the basis that Ellis was a comparative negligence action from the outset and no party asserted claims against the governmental entities which could subject the governmental entities to monetary liability.

The Court in *Ellis* distinguished *Kennedy* on the basis that *Ellis* was a comparative negligence action from the outset and no party asserted claims against the governmental entities which could subject the governmental entities to monetary liability.[32] The Court found that it would be inconsistent to suggest the action of one defendant in settling the claim can broaden another defendant's liability beyond what it would have been had the case went on to trial.[33] As it did in *Kennedy*, the Court in *Ellis* stated that its decision in no way is meant to jeopardize settlement of actions, and reaffirmed that settlements are favored in the law.[34]

Ellis teaches: (1) joinder of third-party defendants for the purpose of comparative fault alone is not sufficient where a party has not sought damages from the third-party defendants; and (2) 60-258a(c) does not provide the full power and/or benefits of formal joinder to the case.

Teepak

In *Teepak*, the issue on appeal was whether Kansas comparative fault law permits a tortfeasor to settle with the injured person and then proceed against a physician whom the tortfeasor (but not the injured party) claims added to the injured party's damages through negligent treatment of the injured party.[35] Initially, a husband and wife filed suit in federal court against Teepak and a sausage manufacturer because sausage casing had obstructed the husband's small intestine, requiring surgery.[36] Learned had performed surgery on Baise.[37] At no time did the husband and wife assert a cause of action against Learned;[38] however, Teepak filed a third-party complaint against the doctor seeking "indemnity or subrogation" for sums Teepak might have to pay the Baises.[39] Additionally, Teepak filed suit against the doctor in state court seeking indemnification for any of Teepak's liability to the Baises which "is chargeable and attributable to the negligence of Dr. Learned."[40]

Teepak settled with the husband and wife,[41] and the federal case was dismissed.[42] The third-party complaint in federal court was dismissed without prejudice at the time the federal action was dismissed.[43] Teepak proceeded with its action against Learned in state court. Learned filed motions seeking dismissal claiming Teepak's action was barred by virtue of the statute of limitations having expired and the failure of Teepak to have asserted a valid claim.[44] The district court denied both motions, and the matter reached the Kansas Supreme Court on Learned's interlocutory appeal.[45]

The Court held that its opinion in *Brown v. Keill*[46] was not limited solely to the joint tortfeasor situation, and would still apply to successive tortfeasors.[47] Teepak could have brought Dr. Learned into the Federal action as a party whose negligence should be compared, but instead, Teepak brought Learned in under third-party practice, an indemnification procedure.[48] Relying on its holding in *Ellis*, that a settling defendant cannot create liability where there is none, the Court found Teepak had no cause of action against Learned predicated upon contribution.[49] The

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Comparative Implied Indemnity, Third-Party Practice and Settlement Considerations in the Wake of DCI *(Continued from pg 10)*

Court also determined that Teepak did not state a claim for indemnification against Learned, but rather was seeking post-settlement contribution.[50] Accordingly, the Court found the holding of *Kennedy* relative to "comparative implied immunity" did not apply.[51]

Teepak demonstrated that: (1) "comparative implied indemnity" in Kennedy has a far narrower application than originally anticipated; and (2) Ellis is controlling over situations where the facts demonstrate that contribution – not indemnification – is the goal.

Teepak demonstrated that: (1) "comparative implied indemnity" in *Kennedy* has a far narrower application than originally anticipated; and (2) *Ellis* is controlling over situations where the facts demonstrate that contribution – not indemnification – is the goal.

The prior holdings in *Kennedy*, *Ellis* and *Teepak* set the stage for what would become *DCI*. All three contributed to the impact on a settling defendant's ability to collect from those not at the negotiating table at the time of settlement. *Kennedy* snuffed out any life remaining in the concept of joint and several liability in Kansas in the comparative negligence context, and established that contribution among joint judgment debtors is no longer needed in such cases because separate individual judgments are to be rendered. *Ellis* that found joinder of tortfeasors only for the purpose of determining comparative fault is not sufficient to establish a claim for comparative implied indemnity if the joint tortfeasors are not exposed to potential liability. *Teepak* reinforced the Court's dissection of the terms "indemnity" and "contribution," and held that "comparative implied indemnity" is a limited concept not available between all joint torfeasors. In *DCI*, the Court pulled its holdings in *Kennedy*, *Ellis* and *Teepak* together to create its clearest message on questions related to contribution, indemnity and the abrogation of joint and several liability.

PRACTICAL CONSIDERATIONS

The holding in DCI raises some practical considerations of which to be mindful. Such considerations appear both in the context of third-party practice, and in advising clients on issues pertaining to settlement.

Third Party Practice

DCI, as well as *Kennedy*, *Ellis* and *Teepak*, touched on the methods of joinder, focusing primarily on K.S.A. 60-258a(c), with minimal reference to K.S.A. 60-214(a). For the practitioner concluding that simply joining any potentially responsible party is a way around the harsh result of *DCI* and *Ellis*, standard joinder by way of K.S.A. 60-214(a) is not broad enough to cover all potential situations. The joinder provision in K.S.A. 60-214(a) limits a defendant's ability to join only a person who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. While in most instances, a plaintiff would gladly sue anybody and everybody she can, there are many situations where the third-party defendant would not be liable to the third-party plaintiff, but would be liable directly to the plaintiff in the action. In situations where there are logistical, tactical, or perhaps even personal reasons making the plaintiff unwilling to pursue a claim against the third-party defendant, K.S.A. 60-214(a) does not give the defendant the power to join such third-party defendant.

The remedy for a defendant who cannot join a party by K.S.A. 60-214(a) was thought to be "joining" the additional party pursuant to K.S.A. 60-258a(c). Yet, the holding in *Ellis* instructs that joinder under this provision is not sufficient to establish entitlement to comparative implied indemnity if the party is not also exposed to potential liability by being sued directly by the plaintiff. The provisions in 60-214(a) and 60-258a(c) appear harmonious, in that they cover both the situation where a third-party defendant would be liable to a defendant for claims brought against a defendant by a plaintiff, and the situation for "joining" a party for the purposes of comparison of fault. However, they are only completely complimentary in the context where a case proceeds to trial, and separate judgments are entered against the individual defendants as contemplated by K.S.A. 60-258a(d).

When a case is settled, the third-party defendant "joined" by K.S.A. 60-258a(c) can escape liability if such third-party defendant's proportionate liability is not established. Justice Herd's dissenting opinion in *Ellis* suggested a party "joined" by K.S.A. 60-258a(c) should be considered formally joined as a party to the action if proper service is made. However, in situations where either service cannot be accomplished, or other factors make obtaining service impractical, the window of opportunity for a joint tortfeasor to escape liability remains open.

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Comparative Implied Indemnity, Third-Party Practice and Settlement Considerations in the Wake of DCI *(Continued from pg 11)*

Defense counsel need to be both vigilant and creative in developing ways to avoid the situation borne out in *DCI*. In some instances this can be accomplished by the defendant ensuring that the joint tortfeasor is formally joined in the case, such that the joint tortfeasor is exposed to liability in the case. Those instances in which formal joinder is not possible or practical present more difficult circumstances requiring defense counsel to be more inventive in getting the joint tortfeasor to the negotiation table.

DCI reinforces the importance of candid and comprehensive discourse with clients when settling cases.

From the outset of the case, defense counsel's investigation must include early identification of potential tortfeasors and/or contributors to a potential settlement. Defense counsel must not only search out those whose fault should be compared, but also develop ways to either compel the plaintiff to formally join the entity (if defendant cannot do so through K.S.A. 60-214(a)), or develop creative ways to make sure the joint tortfeasor is subject to liability in the case, or joined for purposes of comparative fault. Defense counsel should also be mindful of the particular forum's local rules or judicial orders affecting timeliness for joining parties or identifying others whose fault should be compared. Early assessment of potential difficulties of completing such investigations and identification of other parties is important, so counsel can timely advise the court of potential difficulties when the court establishes its case management or scheduling order. Early identification of joint tortfeasors becomes even more critical as more Courts encourage, if not require, ADR to occur at earlier stages in the litigation.

<u>Advising Client Regarding Settlement</u>

DCI presented a scenario where DCI's settlement with BNSF effectively terminated DCI's ability to pursue Barber County and Moore Township. As the Court noted, joinder of the county and township either by K.S.A. 60-214 (a) or K.S.A. 60-258a(c) would not have saved DCI's claim for comparative implied indemnity. Upon settlement with BNSF, where the county and township were not exposed to liability in the case against BNSF, the county and township escaped all liability.

DCI reinforces the importance of candid and comprehensive discourse with clients when settling cases. In the analysis of whether to settle, counsel must give due consideration to the involvement of other tortfeasors if counsel expects or anticipates seeking indemnity from those not at the negotiation table. This involves having already taken appropriate steps to ensure such other tortfeasors have been joined in the case, or designated for comparative fault purposes. However, it also involves a realistic assessment of the potential contribution of other tortfeasors towards the settlement, or in some cases, the viability and enforceability of an indemnity claim after settlement. *DCI*, and the cases before it, demonstrate that claims labeled implied comparative indemnity, which are in reality claims for post-settlement contribution, can leave the window open for joint tortfeasors to escape liability, and leave the settling defendant holding the bag.

Counsel must not only advise clients as to whether they should settle, but also as to when they should settle. With participation in ADR occurring at an early stage in the litigation, it becomes more likely that defen-

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Comparative Implied Indemnity, Third-Party Practice and Settlement Considerations in the Wake of DCI *(Continued from pg 12)*

dants will face pressure to settle before joint tortfeasors have been identified and added as parties. In many instances, the early identification, joinder and/or designation of those whose fault should be compared will have occurred. However, in situations where that has yet to happen, counsel must accurately assess the potential benefit in waiting to settle the case if there is the potential for the addition of other tortfeasors as sources for potential contribution to the settlement. It could be argued that the outcome of *DCI* may have been different had the settling defendant waited to settle and dismiss the federal suit until such time as DCI and Slattery had brought the county and township into the case, or otherwise taken steps to assure the county and township were participants in the ADR process routinely required by Kansas federal judges.[52]

Some may interpret *DCI* in a way to suggest that communication and cooperation between a named defendant and a yet unnamed potential defendant will be stifled. However, in unique situations, the holding in *DCI* may present an opportunity for defense counsel to develop creative solutions in settling cases. For instance, an unnamed tortfeasor might be willing to participate or contribute to a settlement reached by a named defendant if such settlement achieves a complete release by the plaintiff, and the unnamed tortfeasor is not brought into the case.

In unique situations, the holding in DCI may present an opportunity for defense counsel to develop creative solutions in settling cases.

POLICY CONSIDERATIONS

Those who may be critical of the holding in *DCI* might argue *DCI* has confirmed and cemented the very fears expressed by Justices Fromme and Holmes when they joined Justice Herd's dissenting opinion in *Ellis*,[53] namely that in cases where all joint tortfeasors are not joined by the plaintiff, a defendant has less incentive to settle a lawsuit because in effect, the defendant must buy the whole case. The Court in *Kennedy* and *Ellis* expressed the general public policy that the law favors settlements; yet detractors would contend the majority decision in *Ellis* did not advance this policy, but rather hindered it. And so the critical argument goes, by placing a defendant in a situation where it must pay for the negligence of all tortfeasors or pay the cost for and risk the outcome of a trial, the policy favoring settlement suffers.

It is unfair on its face to ask a settling defendant to further the policy goals of settlement while closing the door to recoupment of a portion of the settlement from joint tortfeasors. This inequity was recognized in the infancy of the Kansas comparative fault statute, where it was stated in *Brown*:

> There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the codefendant to pay more than his fair share of the loss. The same is true if one of the

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Comparative Implied Indemnity, Third-Party Practice and Settlement Considerations in the Wake of DCI *(Continued from pg 13)*

> defendants is wealthy and the other is not.[54]

No social policy compels defendants to pay more than their fair share of the loss, but the framework formed by *DCI* and the cases before it may raise the question for settling defendants about guarding against being placed in the position of paying more than their fair share. In *Brown*, the Court not only predicted, but seemed resigned to accept, that inequities may still result from application of K.S.A. 60-258a:

> Numerous examples of unfairness have been cited by both parties in this case to support their respective positions. The law governing tort liability will never be a panacea. There have been occasions in the past when the bar of contributory negligence and the concept of joint and several liability resulted in inequities. There will continue to be occasions under the present comparative negligence statute where unfairness will result.[55]

Once DCI and Slattery settled with BNSF, and dismissed the federal court case, DCI's third-party petition was dismissed as well, and the county and township had not yet filed their responsive pleading at the time of the settlement and dismissal of the federal court case. By holding that joinder by either K.S.A. 60-214(a) or K.S.A. 60-258a(c) would not have saved DCI's claim for comparative implied indemnity against the county and township, the Court in *DCI* was not so much telling DCI with whom it may settle, but perhaps a better interpretation would be giving more consideration as to *when* it should settle.[56] Despite the Court's nod to favoring settlements in *Ellis*, the Court's recent ruling in *DCI* suggests that the policy favoring settlements is subordinate to the policy of judicial economy that forms the foundation of the one action rule.

Policy considerations aside, DCI makes it clear that defendants cannot count on joint tortfeasors to participate in settlements after the fact.

Policy considerations aside, *DCI* makes it clear that defendants cannot count on joint tortfeasors to participate in settlements after the fact. Ultimately, the burden of this realization will likely fall on plaintiffs: Defendants will be more inclined to join joint tortfeasors under K.S.A. 60-258a(c) and less inclined to settle cases based on full value of the damages; plaintiffs will face more pressure to add defendants, which will have the potential of increasing the size and complexity of some cases. Whether cases will be more or less likely to settle remains to be seen; however, there is no disputing the fact that the landscape for settlement has changed.

CONCLUSION

The significance of the holding in DCI is not that it will be more difficult to settle cases, as feared by Justice Fromme in his dissenting opinion in Ellis. Rather, the outcome may be that future cases will be larger and more complex because plaintiffs and defendants may feel compelled to add as many parties as possible. Part II of this article will focus on the primacy given to the one action rule by the Court's holding in DCI, and discuss the Court's reasoning in confirming that such rule remains alive and well.▲

Mark Katz joined Sherman Taff Bangert Thomas & Coronado, P.C. in 1993, after six years in the Prosecutor's Office in Jackson County, Missouri. He was elected shareholder in 1999. His practice includes personal injury, product liability, insurance and employment litigation. Mr. Katz is a member of the Kansas Association of Defense Counsel and DRI's product liability committee. He has written articles for DRI, the Missouri Bar, and the Missouri Organization of Defense Lawyers. He recently served three years as an instructor in the Trial Advocacy program at the UMKC School of Law.

Larry Nordling joined Sherman Taff Bangert Thomas & Coronado, P.C., of counsel this year, after ten years in a prominent Salina law firm. His practice includes personal injury, product liability and insurance law. Mr. Nordling is a member of the Kansas Association of Defense Counsel and DRI. He has presented for the Kansas Bar Association CLE Program.

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1. Dodge City Implement, Inc. & Slattery v. Bd. Of County Comm'rs & Moore Township, __ Kan. __, 205 P.3d 1265 (April 24, 2009).
2. Id. at 1268.
3. Id.
4. Id.
5. Id.
6. Id.

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7. Id.
8. Id. at 1269-1270.
9. Dodge City v. Board of Barber, 38 Kan.App.2d 348 (2007).
10. Id. at 363.
11. DCI, 205 P.3d at 1271.
12. 228 Kan. 439, 618 P.2d 788 (1980)
13. Kennedy, 228 Kan. at 460.
14. 231 Kan. 182, 643 P.2d 158 (1982).
15. 237 Kan. 320, 321, 699 P.2d 35 (1985).
16. DCI, 205 P.3d at 1278.
17. Teepak, 237 Kan. at 328.
18. Kennedy, 228 Kan. at 441.
19. Id. at 442.
20. Id. at 444.
21. Id. at 460.
22. Ellis, 231 Kan. at 183.
23. Id.
24. Id.
25. Id.
26. Id.
27. Id. at 183-184.
28. Id. at 184.
29. Alseike v. Miller, 196 Kan. 547, 550, 412 P.2d 1007 (1966).
30. McKinney, Administrator v. Miller, 204 Kan. 436; K.S.A. 60-2413(b).
31. Ellis, 231 Kan. at 185-186.
32. Id. at 190.
33. Id.
34. Id. at 192 (citing Fieser v. Stinnett, 212 Kan. 26, 31, 509 P.2d 1156 (1973); Rymph v. Derby Oil Co., 211 Kan. 414, 418, 507 P.2d 308 (1973); Connor v. Hammer, 201 Kan. 22, 24, 439 P.2d 116 (1968)).
35. 237 Kan. 320, 321, 699 P.2d 35 (1985).
36. Id.
37. Id.
38. Id.
39. Id.
40. Id.
41. Id.
42. Id. at 321-322.
43. Id. at 322.
44. Id.
45. Id.
46. 224 Kan. 195, 580 P.2d 867 (1978).
47. 237 Kan. at 325.
48. Id. at 325-326
49. Id. at 326.
50. Id. at 328.
51. Id. at 328.
52. It is not entirely clear that the outcome of DCI could have been avoided, as there was also an issue concerning the ineffectiveness of a letter to the Barber County Clerk which purported to serve as a notice pursuant to K.S.A. 12-105(b). DCI, 205 P.3d at 1280-83.
53. "The effect of today's decision will be to tie the hands of a defendant so that a defendant can no longer settle a case with an injured party. He or she may settle only what he or she conceives to be his or her own limited share of liability." Ellis, 231 Kan. at 195.
54. Brown v. Keill, 224 Kan. at 203.
55. Brown v. Keill, 224 Kan. at 204
56. This point will be further examined and explored in Part II of this article which will focus on the primacy given to the one action rule.

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the absence of a clear showing of abuse. Held: It was not an abuse of discretion to deny Brunner's request to continue the hearing under the circumstances. The Court of Appeals also rejected Brunner's argument that she was not provided a full and complete hearing.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

***Day Advertising, Inc. v. Michael R. Clarke*, Case No. 101,281 (Kan. App. August 7, 2009)**

This is a legal malpractice action. In Kansas, to prevail on a legal malpractice claim, a plaintiff is required to show: (1) the duty of the attorney to exercise ordinary skill and knowledge; (2) a breach of that duty; (3) a causal connection between the breach of duty and the resulting injury; and (4) actual loss or damage. Additionally, the client must establish the validity of the underlying claim by showing that it would have resulted in a favorable judgment in the underlying action had it not been from the attorney's error. When a settlement opportunity is allegedly lost, the client must show that the client and the opposing party would have reached a settlement if not for the attorney's negligence. The Court of appeals concluded that Rule 1.16(d) did not impose a duty on Clarke to continue to negotiate a settlement between Day, Inc. and US West after Clarke was terminated on May 31, 2005. Once Clarke was terminated, he wrote a letter to his client, Day, to inform Day that he had filed a motion to withdraw, to reiterate the offer from the opposing party, to remind Day of his court date, and to urge Day to find another attorney. He also made Day's file available to him. The Court of Appeals found Clarke took reasonable steps to mitigate the consequences of his termination and to adequately protect Day, Inc.'s interests pursuant to Rule 1.16(d).

Based on the evidence, however, Clarke assumed a duty to Day that he did not legally owe when he advised opposing counsel he was willing to communicate and continue the settlement negotiations after he had been terminated. Regardless, the evidence supported Clarke's position that Day rejected Clarke's offer to help settle the case after he was initially terminated. Based upon the uncontroverted evidence, the Court of Appeals determined Day failed to establish that Clarke breached any duty. Affirmed.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

<u>July 31, 2009</u>

***In the Interest of D.D. and C.W.*, Case No. 101,932 (Kan. App. July 31, 2009)**

The Court of Appeals affirmed the District Court's decision terminating the mother's parental rights. A rational factfinder could have found it probable the mother's parental rights should be terminated. After hearing evidence during the termination hearing, the district court on the record, verbally found the State's clear and convincing evidence supported termination of the mother's parental rights. Additionally, the district court's journal entry of termination expressly found the termination of mother's parental rights was in the best interests of the minor children. Although the better practice is for the

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district court's journal entry to expressly state the court's findings are based upon "clear and convincing evidence," a verbal finding, made on the record is sufficient to provide the appellate court with review.

Summary by: William F. ("Liam") Logan of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

In the Interest of E.W., **Case No. 102,309 (Kan. App. July 31, 2009)**

The Court of Appeals affirmed the District Court's decision terminating the mother's parental rights. The district court found, by clear and convincing evidence, that the following four factors supported termination of the mother's parental rights: the mother's cocaine use and unwillingness to seek treatment over the course of 2 years; despite reasonable efforts, the inability of social workers to rehabilitate the family; the mother's lack of effort to adjust her circumstances, conduct or condition to meet the needs of the child; and, the mother's failure to maintain regular contact with the child and the child's custodian.

Summary by: William F. ("Liam") Logan of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

Christian Lord Ministries, Inc. v. Cormier, **Case No. 100,939 (Kan. App. July 31, 2009)**

A tree on the defendant's property overhanging the plaintiff's property periodically shed limbs, causing damage to the plaintiff's building and property. The District Court had entered two final judgments against the defendant for damage caused by his tree, as well as an injunction to require him to remove the tree. The Court of Appeals affirmed the District Court's Order finding the defendant was collaterally estopped from arguing that the plaintiff did not own the property. The conditions necessary to satisfy collateral estoppel were met: a prior judgment on the merits arising from the same factual circumstances and determining the rights and liabilities of the parties; the same parties or parties in privity; and the issue litigated must have been determined and necessary to support the judgment. *In re Tax Appeal of city of Wichita*, 277 Kan. 487, 506, 86 P.3d 513 (2004). Whether collateral estoppel applies is a question of law over which the court exercises unlimited review. *Id.*

Summary by: William F. ("Liam") Logan of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

In the interest of K.M.S., M.A. W.S., A.C.S., children under the age of 18**, Case Nos. 101,410, 101,411, and 101,142 (Kan. App. July 31, 2009)**

The natural parents appealed from the district court's order terminating their parental rights. The Court of Appeals affirmed, concluding the district court did not err when it denied the parents' motion to dismiss for the district court's failure to comply with the time constraints stated in K.S.A. 38-2251, which it held were directory rather than mandatory, and the court's findings to terminate were supported by clear and convincing evidence.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

SimplexGrinnell, LP v. Hackney Electric Co., Inc. and Caro Construction Co., Inc.**, Case No. 99,972 (Kan. App. July 31, 2009)**

Caro Construction Co., Inc. appealed the trial court's judgment against it, including the denial of Caro's motion to strike testimony during the bench trial. Caro was the general contractor on a public works project for a school district. Caro was required to post a bond pursuant to K.S.A. 60-1111. Hackney was the electrical subcontractor, who contracted out part of its work to SimplexGrinell, LP (Simplex). There was no direct contractual relationship between Caro and Simplex.

In an earlier default judgment against Hackney, Judge Friedel decreed Caro was entitled to offset Hackney's prior debt to Caro from funds owed by Caro to Hackney on the school project. Simplex had not been paid for its work. In July 2007, Simplex filed its sworn response to Caro's request for admissions. In those responses, Simplex stated it

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had not filed a bond claim because it was relying on the bond claim filed by Hackney as its notice of bond claim.

When the case went to trial before a different judge, Simplex changed its position and a Simplex employee testified the reason it had not filed a bond claim was in reliance on assurances by Caro that it would provide a joint check. At trial, Caro moved to strike the employee's testimony about why Simplex did not file a bond claim, which was denied. The new judge also made a conflicting ruling from the earlier default judgment entered against Hackney, finding Caro failed to meet its burden of proving it was entitled to an offset against Hackney.

The Court of Appeals held Simplex's reason for not filing a bond claim was conclusively established by its responses to the requests for admission pursuant to K.S.A. 60-236 (b). On appeal, the Court determined Caro was taken by surprise and, further, was substantially prejudiced by this new evidence. To the extent the trial court's decision was based on unjust enrichment, the surprise was highly prejudicial since the trial court's finding of unjust enrichment appeared to have relied almost entirely on the Simplex employee's reliance testimony. The Court of Appeals held the motion to strike should have been granted.

With respect to the conflicting ruling regarding Caro's right to offset, the Court of Appeals held that no motion to set aside the earlier default judgment had been filed and the trial court's judgment against Caro did not purport to modify or set aside the default judgment. Reversed and remanded with directions to recognize as final the default judgment entered by Judge Friedel in Caro's favor and to enter judgment in Caro's favor on Simplex's claim against Caro.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

***ECK Enterprises, L.P. and Joan Eck, Executor of the Estate of O.L. Eck v. CRS, LLC and Charles W. Sanders*, Case No. 99,983 (Kan. App. July 31, 2009)**

Sanders appealed the trial court's enforcement of a mediation agreement involving the dissolution of CRS, LLC, and the settlement of related claims. Sanders claimed the trial court erred in allocating the relevant burdens of proof. Determination of the burden of proof is a question of law over which appellate courts have unlimited review. The Court of Appeals determined that the trial court did not err in characterizing Sanders' argument as an affirmative defense, placing the burden of proof on him. The trial court did not err in finding Eck satisfied his burden to prove the existence of a contract that was valid at the time of formation. The mediation agreement was introduced into evidence and the trial court found the parties did not dispute the enforceability of the contract at formation.

With respect to Sander's affirmative defense, the Court of appeals noted a trial court's finding that a party failed to meets its burden of proof is a negative finding, which it will not disturb absent arbitrary disregard of undisputed evidence or some other consideration

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such as bias, passion, or prejudice. The Court of appeals held the trial court's rulings were supported by the record. Sanders failed on his burden to show impossibility of performance because he failed to make notable efforts to avoid the situation he now claimed as an excuse for nonperformance, as required by the Restatement (Second) of Contracts § 261, comment d (1979).

The trial court found that the mutual release of claims and settlement of litigation was the main purpose of the mediation agreement. The Court of Appeals noted the law favors compromise and settlement of disputes, and ordinarily, absent bad faith or fraud, when parties enter into an agreement settling a dispute, neither party is permitted to repudiate it. The trial court did not err in enforcing the mediation agreement. Affirmed.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

***Presta Oil #16, Andover, KS v. Clinton James Allen*, Case No. 100,369 (Kan. App. July 31, 2009)**

An alias summons was issued on November 8, 2007 for a hearing on December 6, 2007 in a limited action matter. Allen was then personally served. Allen failed to appear at the hearing and a default judgment was entered against him. Thereafter, Allen filed a pro se motion for relief from the default judgment on the grounds he was incarcerated at the time of the hearing, not represented by counsel, and powerless to attend the hearing. The district court denied his motion and he appealed.

Allen argued the default judgment violated K.S.A. 60-255 because he was incarcerated, which meant he was an incapacitated person under a legal disability, as defined in K.S.A. 77-201. The decision of whether to grant relief from a default judgment rests in the sound discretion of the district court and is reviewed for an abuse of discretion.

On appeal, Allen offered no argument as to why he was unable to file a timely written answer to the petition. The district court's entry of the default judgment was consistent with K.S.A. 61-3301(a)(1). Further, a motion to set aside was required to be filed within 10 days after the default judgment was entered. K.S.A. 61-3301(c). The statutory time limit is jurisdictional and failure to timely file the motion deprived the district court of jurisdiction to address the motion. Allen failed to timely file his motion to set aside. Affirmed.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

<u>July 24, 2009</u>

***State of Kansas v. Brian Joseph Dahmer and Crevier Bonding and American Surety Company*, Case No. 99,384 (Kan. App. July 24, 2009)**

The Governor approved an amendment to K.S.A. 22-2807 that altered when the State could collect on a criminal defendant's forfeited appearance bond 6 days after Dahmer missed his court hearing and forfeited the

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bond that he had obtained through American Surety Company (ASC). The amendment provided a new defense to a surety against judgment on an appearance bond: "If the surety can prove that the defendant is incarcerated somewhere within the United States prior to judgment of default then the court shall set aside the forfeiture. Upon the defendant's return, the surety may be ordered to pay the costs of that return." ASC argued that the amended statute should be applied retroactively and, as such, it would not be required to pay the $5,000 forfeited bond to the State. Unless clearly specified in the statutory language, a new or amended statute operates prospectively - not retroactively. There is an exception to that rule where the statutory change is procedural or remedial and does not prejudice a party's substantive rights. Here, the Court of Appeals found the statute was remedial but the change would prejudice the State's substantive rights. Thus, under both the general rule and the exception, the statutory change may only be applied prospectively. The district court correctly held that ASC was still liable for Dahmer's forfeited bond. The Court of Appeals also rejected the two other arguments raised by ASC on appeal, involving mitigation and failure to set aside the forfeiture. Affirmed.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

July 17, 2009

Becky Burton v. Kansas Department of Labor and Law Office of Thomas C. Boone, Case No. 100, 427 (Kan. App. July 17, 2009)

Becky Burton, a paralegal, appealed the district court's denial of her petition to review a Kansas Department of Labor (KDOL) order that awarded her minimal interest and did not assess a penalty against the Law Office of Thomas C. Boone for withholding her wages. Boone told Burton he did not have the money to make payroll. Burton suggested Boone hold her paycheck and pay her when he could. Three months later, Boone terminated Burton; however, he was still unable to pay her wages. After her termination, Burton demanded her withheld wages. Boone responded he still could not afford to pay. After Burton retained counsel, Boone threatened to sue Burton, her legal counsel, and a secretary for invasion of privacy, libel and slander. Burton filed a wage claim. In response, Boone filed his threatened lawsuit. Boone later agreed to dismiss his suit without prejudice. Boone also paid the withheld wages. Burton requested the KDOL impose interest and penalties. KDOL imposed $199.55 in prorated interest and refused to prescribe a penalty.

Burton argued that the KDOL erred when it found that Boone did not act willfully when he failed to pay her wages and should be subject to statutorily imposed penalties and interest. Whether an employer willfully failed to pay wages is a question of fact. An appellate court reviews a KDOL administrative order's findings of fact for substantial competent evidence. The record reflected that although Boone intentionally withheld Burton's wages, he did not willfully withhold her wages. Burton failed to prove that Boone had the funds to pay her and willfully decided not to pay. Rather, the record suggested that Boone paid Burton's wages as soon as practicable irrespective of his lawsuit. Additionally, Burton merely argued in

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passing that the KDOL inaccurately calculated her interest without suggestion as to what should be the proper interest. As such, the issue was deemed waived. Affirmed.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

July 10, 2009

***Ron Cummings v. Ina M. Gish, et al*, Case No. 100,832 (Kan. App. July 10, 2009)**

Although the Nears attempted to raise a number of issues on appeal, the Kansas Court of Appeals determined that the Nears had failed to comply with the requirements of K.S.A. 60-2103(b) and, as such, failed to preserve all but one issue on appeal. The Nears argued the district court erred by not allowing any of their fees and costs to be apportioned among the parties because K.S.A. 60-1003(c)(5) indicates that it is mandatory to tax and apportion all costs and fees among the parties. The allowance of attorneys fees in a partition action is a matter resting in the sound judicial discretion of the trial court. Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable. The party asserting the district court abused its discretion bears the burden of showing such abuse of discretion. The Nears did not set forth how the district court abused its discretion in assessing costs and fees and, therefore, failed to satisfy their burden.

Addressing the underlying issue, the Kansas Court of Appeals held the district court did not abuse its discretion in refusing to apportion the attorney fees and costs among the parties, because the Nears were sanctioned for their behavior and misrepresentations to the court. Affirmed in part and dismissed in part.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

***In the Matter of the Adoption of R.J.A. and H.L.A.*, Case No. 100, 723 (Kan. App. July 10, 2009)**

The step-father filed a petition to adopt his wife's natural children. The district court granted the petition finding the natural father's consent was not necessary under K.S.A. 2008 Supp. 59-2136(d) because the father had failed or refused to assume the duties of a parent for the 2 years preceding the filing of the adoption petition. Reversed.

The natural parents married in March 1997 and bore three children. The natural parents divorce became final in February 2005. Their middle child passed away one month later. The natural father had a drug habit and failed to satisfy his child support obligations. After the divorce, the father also plead guilty to four separate criminal cases. The father spent approximately 6 months in jail during the 2 years prior to the filing of the adoption petition. In September 2005, as a result of protection-from-abuse and contempt proceedings initiated by the mother, the father was prohibited from visiting or contacting his children until he completed a drug rehabilitation program and paid his child support obligations. The father finally graduated from a drug treatment program in June 2007 and passed all drug tests that year. After he was released from jail in

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April 2007, he began paying $100 per month to SRS toward a judgment SRS obtained in its 2003 reimbursement lawsuit. From September through December 2007, he made several payments toward his current child support obligation. Each of these payments were credited to the father's judgment owed to SRS. Once the SRS judgment was satisfied, his subsequent payments were returned to him, due to no fault of his own.

The Court of Appeals noted the principal of strict interpretation of the adoption statutes in favor of maintaining the rights of natural parents does not equate with or translate into a standard of proof requiring the district court, when considering a stepparent's petition for adoption to resolve the facts in the natural parent's favor or to otherwise give the natural parent the benefit of the doubt. When reviewing a district court's factual findings underlying its decision in a stepparent adoption case, an appellate court reviews the facts in a light most favorable to the prevailing party below. The father challenged the sufficiency of the evidence to support the district court's finding that he failed to assume the duties of a parent for the 2-year period preceding the filing of the stepfather's petition. The Court of Appeals agreed.

The factual determination of whether a father has failed to assume his parental duties under K.S.A. 2008 Supp. 59-2136(d) requires consideration of two statutorily recognized parental duties: (1) duty to demonstrate love and affection through visitations, contacts, communications, or contributions; and (2) duty to support the child by providing a substantial portion of child support as required by judicial decree, when financially able to do so. The evidence established the father failed to perform his duty to demonstrate love and affection. Yet, the Court of Appeals was not persuaded, however, that there was clear and convincing evidence that established the father did not perform his duties with respect to his financial responsibilities. The Court of Appeals held the father attempted to make current child support payments totaling over $1000 in 2007 in addition to several hundred dollars he paid on his debt to SRS. These payments were made prior to the step-father's filing of the petition for adoption. Despite the father's intent, the payments were applied to his obligation to SRS and then returned to him after the obligation was paid. The Court of Appeals held the record lacked clear and convincing evidence necessary to establish the father failed to fulfill his duties on the financial side and, therefore, his consent is necessary before any adoption of his children can take place. Reversed.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

***In the Interest of C.F., a Minor*, Case No. 101,716 (Kan. App. July 10, 2009)**

The natural father appealed the district court's order terminating his parental rights to his daughter C.F. The father argued the court erred in relying solely on his incarceration as a reason for terminating his parental rights. The state argued the evidence in the record was clear and convincing and in addition the presumption of unfitness provided in K.S.A. 2008 Supp. 38-2271 applied.

The appellate court found the journal entry was unclear regarding the statutory basis for the district court's decision to terminate the father's parental rights. Neither the state nor the district court announced K.S.A. 2008 Supp. 38-2271 was being utilized to find the father presumptively unfit. With no specific findings by the district court, the appellate court does not have the authority to apply the presumptions in K.S.A. 2008 Supp. 38-2271. Similarly, the district court did not indicate in the journal entry or from the bench that the factual findings were based on clear and convincing evidence. Reversed and remanded to the district court to make the necessary findings of fact and conclusions of law.

Summary by: William F. ("Liam") Logan of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

***In the Matter of the Adoption of Baby W.*, Case No. 101,258 (Kan. App. July 10, 2009)**

The natural father of Baby W. appealed the district court's order terminating the father's

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parental rights in the course of this adoption proceeding. The natural father argued the district court erred in finding that he made no reasonable efforts to support or communicate with the child after having knowledge of the child's birth.

In March 2007, the father and A.N.W. (the mother) began dating while living in Virginia. In April 2007, the mother informed the father she was pregnant. The mother was concerned with father's friends and his use of alcohol and drugs. The mother told him on several occasions that he needed to stop and threatened to move to Kansas if he did not. Nevertheless, these behaviors continued. Toward the end of July 2007, the mother believed she had miscarried and informed the father of this. Soon after, she left Virginia and moved to Manhattan, Kansas, due to the father's behavior. The father only learned of the mother's move when her father informed him. The father had no contact with the mother after her move to Manhattan. On January 15, 2008, the mother began experiencing cramps and went to the hospital where she gave birth to Baby W. The mother did not realize she was still pregnant until this occurred.

On January 16, 2008, the adoptive parents filed a petition for adoption of Baby W. The mother's consent to the adoption was attached to the petition. On February 7, 2008, the adoptive parents filed a petition for termination of the father's parental rights. In March or April 2008, appointed counsel was able to locate the father. This was the first time the father learned that the mother had not miscarried and she had actually had the child. The father entered his appearance and consented to genetic testing. The father subsequently acknowledged paternity, filed an objection to the adoption petition and a motion for temporary custody. The father acknowledged he did not expect to get residential custody since he lived in Virginia, but informed the court he was "ready and willing" and would like to get residential custody of Baby W. as soon as possible. Following a termination hearing, the district court terminated the father's parental rights on the grounds the father made no reasonable efforts to support or communicate with the child after having knowledge of the child's birth.

The appellate court held that the district court's finding that the father made no reasonable efforts to support or communicate with Baby W. after learning of the child's birth was supported by clear and convincing evidence at the hearing. The father made no reasonable efforts to *actually* support or communicate with the child after learning of Baby W.'s birth and indeed passed up the mother's offer to arrange such opportunity. The father's actions in merely challenging the adoption and termination of his parental rights were not sufficient to show that he made reasonable efforts to support or communicate with his child. Affirmed.

Summary by: William F. ("Liam") Logan of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

July 2, 2009

***Lucille Chapman v. Kansas Basement & Foundation Repair, Inc.*, Case No. 100,941 (Kan. App. July 2, 2009)**

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After a bench trial, the plaintiff appealed the district court's judgment against her on her contract and warranty claims. The plaintiff's home had preexisting structural defects. She then hired the defendant to make some repairs, which she claimed were defective and devalued her home. In light of the preexisting structural defects, the district court determined that expert witness testimony was required to substantiate that any breach of contract or warranty by the defendant caused the diminution in value to the plaintiff's home. On appeal, the plaintiff argued, as a homeowner, she was entitled to offer her opinion of market value. The Court of Appeals commented the plaintiff missed the point as the district court's ruling was based on the absence of evidence establishing the causal link between the alleged breach of contract and the alleged diminution of value. Affirmed.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

***Jeffrey Morrow v. Brett J. Mosiman and Wakarusa Music Group, Inc.*, Case No. 100,351 (Kan. App. July 2, 2009)**

The plaintiff appealed the trial court's grant of summary judgment. The plaintiff and three other individuals formed WMG, L.L.C. The members subsequently attempted to reorganize the operating structure of WMG, L.L.C. A reorganization agreement (ITRA agreement) was eventually executed by the members. The plaintiff's response to the defendant's motion for summary judgment failed to fully comply with Rule 141; however, his briefing included an additional statement of uncontroverted facts. Based on a review of the record, including the plaintiff's additional statement of uncontroverted facts, the Court of Appeals determined there were facts that supported the inference that the WMG members did not consider the ITRA to be a binding, enforceable agreement. The trial court failed to consider these facts and inferences because it believed doing so would violate the parol evidence rule. That rule, however, states when a contract is complete and unambiguous, parol evidence of *prior or contemporaneous agreements* or understandings tending to vary the terms of the contract evidenced by the writing is inadmissible. Yet, the evidence the plaintiff relied on to create a material question of fact concerning the enforceability of the ITRA was of *subsequent understandings* concerning the parties' repudiation of the preexisting ITRA. The Court of Appeals held the trial court erred in failing to consider the evidence and concluded the enforceability of the ITRA remained a material question of fact yet to be resolved. Reversed and remanded.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

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***Rene Shutte and Karla Shutte v. Petter Construction Company, Inc., Steven A. Petter, and Roxanne Petter*, Case No. 99,870 (Kan. App. July 2, 2009)**

The plaintiffs entered into a new construction residential home sales contract with Petter Construction Company, Inc.; yet, the work was never completed. The plaintiffs filed suit against Petter Construction Company and the Petters individually, asserting multiple claims, including breach of contract. The district court awarded the plaintiffs damages against Petter Construction Company; however, the district court held the plaintiffs failed to establish the company operated as the Petters' alter ego and, as such, the Petters were not individually liable for damages assessed against the company.

On appeal, the plaintiffs argued the district court erred in denying their request to find the company operated as the Petters' alter ego. The Court of Appeals found the Petters' actions in observing many, but not all, of the corporate formalities was insufficient – standing alone – to justify piercing the corporate veil. It held there was nothing to support a conclusion that the district court arbitrarily disregarded undisputed evidence or improperly considered bias, passion, or prejudice in denying the Shuttes' request to pierce the corporate veil. *Held*: The mere inability to collect their judgment against the company in the underlying breach of contract case was not enough to show fraud or injustice resulting from use of the corporate entity. Affirmed.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

<u>June 26, 2009</u>

***In the Matter of the Estate of Ruby L. Porter, deceased*, Case No. 100,901 (Kan. App. June 26, 2009)**

Two heirs and beneficiaries under a will appealed from a district court ruling on personal property allegedly taken from the probate estate and from the court's award of attorney's fees. The Court of Appeals repeatedly noted that the record on appeal was incomplete and fragmented. With respect to the personal property, the appellants argued they were denied a hearing. In evaluating the award of attorney's fees, the Court of Appeals was asked to consider whether the district court must reference Supreme Court Rule 1.5(a) on the record. Because the record on appeal was inadequate, the Court of Appeals held Appellants failed to show error on both issues.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

***Brazil v. Bank One Corp. and Kemper Insurance Companies*, Case No. 100,989 (Kan. App. June 26, 2009)**

Brazil appealed the decision of the Workers Compensation Board finding she failed to prove her injury arose out of her employment with Bank One. Although she had an admitted pre-existing injury, Brazil claimed she suffered a compensable injury when she injured her back while she sat at a desk, reviewed files for 15-30 minutes, and then leaned from her chair to pick up a new 50-75 page file. The Court of Appeals noted an injury shall not be deemed to have been directly caused by the employment where it is shown the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living. The Court affirmed the Board's decision, finding the facts of this case are indistinguishable from Johnson v. Johnson County, 36 Kan. App. 2d 786 (2006)(claimant's act of standing up from a chair to reach for something at work was normal activity of day-to-day living). Affirmed.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

***Flowers v. Payless Shoesource, Inc. and Zurich American Insurance*, Case No. 100,866 (Kan. App. June 26, 2009)**

Payless and Zurich sought reversal of an award by the Workers Compensation Board to Flowers related to his total knee replace-

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ment. Claimant previously injured his knee and it was seriously deteriorated. Four years later, claimant suffered a second injury to his knee. Prior to the subject fall, his knee condition did not require him to seek medical attention or miss any work. After he fell, claimant required medical attention, culminating in a total knee replacement. The Court of Appeals noted a claimant is always competent to testify as to his medical condition and the need for treatment. The Court of Appeals held there was substantial competent evidence produced to uphold the Board's order for Payless and Zurich to pay the medical bills. Affirmed.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

***Nowak and Nowak v. Gillham*, Case No. 100,252 (Kan. App. June 26, 2009)**

First Southern Baptist Church sought an injunction against former church members (the Nowaks). The Nowaks counterclaimed for battery, later adding Robby Gillham as a third party defendant on the battery claim. On the battery claims, the trial court entered summary judgment against the Nowaks. The Nowaks and the church entered into an agreed permanent restraining order and injunction. The Nowaks appealed the summary judgment ruling and rulings regarding the trial court's jurisdiction on the church's injunction claim. Because the Nowaks entered into an agreed permanent restraining order and injunction, the Court of Appeals held the Nowaks could not take an inconsistent position and argue the trial court lacked jurisdiction to enter the same.

On the battery claims, Mary Nowak had a dispute with her former pastor. She previously sent disturbing letters and previously physically hit the pastor. On the date in question, she was admittedly angry, shouting, and refused to leave the premises. To persuade her to leave, a church usher, Gillham, grabbed her arm for 15-20 seconds, causing no injury. The Court of Appeals held, based on the peculiar facts presented, Gillham's belief some force was necessary to terminate Mary's intrusion was reasonable as was his belief that a further verbal request would be useless. Further, the amount of force used was reasonable. Affirmed.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

***National City Mortgage Company v. Brinkley*, Case No. 100,126 (Kan. App. June 26, 2009)**

Brinkley appealed the district court's decision granting National City Mortgage Co. a lien priority in foreclosure proceedings on the residential property of her ex-husband. Brinkley argued the district court erred in concluding her judgment lien was released by an October 20, 2003 warranty deed or by a release signed on December 29, 2003. Affirmed. Held a judgment lien pursuant to K.S.A. 60-2202 will not attach to a valid homestead unless previously and specifically designated as a judicial lien by the divorce court. Further, pursuant to the express terms of the agreement, the Property Settlement was void because Brinkley's ex-husband failed to make a required payment and, as such, any judgment lien would also have become unenforceable.

Brinkley argued the district court misconstrued the October 20, 2003 deed as a warranty deed, arguing that it does not sufficiently comply with the requirements of K.S.A. 58-2203. The Court of Appeals detailed the differences between a quit claim deed and a warranty deed; however, it held, because the deed was not included in the record on appeal, Brinkley's related claim of error failed.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

***Honeywell International, Inc. v. RTF International, Inc., et al.*, Case No. 98,933 (Kan. App. June 26, 2009)**

RTF and others appealed from the trial court's judgment awarding $3,509,913.94 in money damages, plus interest, to Honeywell. Due to numerous discovery violations, the trial court granted Honeywell's motion for

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discovery sanctions and entered a default judgment against the appellants on all of Honeywell's claims. The only issue remaining for trial was the amount of damages due. Honeywell presented evidence that the total amount of the unpaid invoices for goods received was $6,818,495.73. With respect to certain recovered goods, Honeywell presented evidence the estimated value was $2,814,968.06, which included a 15% reduction as a restocking fee. Because there was no evidence of a contract to pay a restocking fee or evidence establishing the actual cost of restocking, the trial court would not allow Honeywell to recover those fees. The appellants did not contest the default judgment. The appellants tried to avoid liability for damages on the basis that goods might have been ordered and shipped to one of the defendant's sister company, which the Court of Appeals categorized as an avoidance defense. The Court of Appeals found appellants presented no evidence at the damages trial that they could avoid liability on the basis that RTF Canada had actually ordered and received some of the goods. Further, even assuming the appellants' point was valid, they were still jointly and severally liable on the other theories pled in Honeywell's petition, including fraud, conspiracy, and conversion. The Court of Appeals affirmed the trial court's decision appellants were liable for payment of the unpaid invoices.

Next, the Court of Appeals addressed and rejected the appellants' argument that Honeywell's expert witness disclosure was untimely and should have been excluded, finding Honeywell had substantial justification for its timing. The Court of Appeals also addressed and rejected the appellants' argument that Honeywell should have been required to sell all of the recovered parts before getting damages pursuant to K.S.A. 84-2-706. The Court held Honeywell's valuation under K.S.A. 84-2-708 was reasonable. Finally, the Court of Appeals held there was no abuse of discretion in the trial court's award of prejudgment interest on the liquidated damages.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

June 19, 2009

***In the Matter of Shirley Gamble*, Case No. 100,174 (Kan. App. June 19, 2009)**

The Executrix of the decedent's will appealed the district court's decision concerning interpretation of the will. The appellate court affirmed the district court's decision construing the will. The appellant's argument that the district court lacked authority to construe the will was without merit. The Executrix's petition for final settlement asked the court to construe the will and to determine the applicability of K.S.A. 59-615. The district court had the authority and duty to interpret the decedent's will.

Summary by: William F. ("Liam") Logan of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

***Eichelberger v. Price Truck Line, Inc.*, Case No. 100,370 (Kan. App. June 19, 2009)**

Appeal from the order of the Workers' Compensation Board. The Board's decision was affirmed. Since, the employee timely filed his notice of appeal once he had notice of the ALJ's award, the Board did not err in finding it had jurisdiction.

Summary by: William F. ("Liam") Logan of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

***Wunderlich v. Casey's General Stores, Inc.*, Case No. 100,874 (Kan. App. June 19, 2009)**

Appeal from the order of the Workers' Compensation Board awarding the parent's of the deceased employee death benefits pursuant to K.S.A. 2008 Supp. 44-510b(d). The Board's decision was affirmed. The appellate court held that accidental death and dismemberment ("AD&D") insurance cannot be used to satisfy the statutory life insurance minimum set forth in K.S.A. 2008 Supp. 44-105b(d).

Summary by: William F. ("Liam") Logan of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

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***Kiser v. Tractor Supply Company*, Case No. 100,976 (Kan. App. June 19, 2009)**

Appeal from the Workers' Compensation Board. The employer appealed the employee's work disability award on the grounds the employer offered the employee full time work within all his physical restrictions. The Board's decision was affirmed. The evidence supported the Board's conclusion that the employer failed to show employee turned down a position that accommodated his work restrictions.

Summary by: William F. ("Liam") Logan of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

<u>June 12, 2009</u>

***May v. Holdaway*, Case No. 99,833 (Kan. App. June 12, 2009)**

The defendants appealed the district court's denial of their motion for summary judgment on the plaintiffs claim of fraud by silence. The plaintiffs, who purchased residential real estate from the defendants, contend the defendants failed to disclose the true nature and extent of the septic system on the property. Following denial of summary judgment, the plaintiffs claims of misrepresentation and fraud by silence were tried to a jury, which determined there was no misrepresentation but awarded damages based on fraud by silence. The Appellate Court affirmed the district court's decision that there were factual issues for the jury as to the nature and extent of the septic system, the defendants' knowledge of the nature and extent of the septic system and whether the defendants' representations were accurate. The Appellate Court also affirmed the district court's conclusion that the terms of the Seller's Disclosure Statement did not shield the seller from claims of fraud by silence. As to the defendants' statute of limitations argument, the Appellate Court affirmed that the plaintiffs brought their action within two years of the discovery of the fraud and they could not have with reasonable diligence discovered the fraud any sooner than it was actually discovered.

Summary by: William F. ("Liam") Logan of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

***In re Estate of Morgan Hetrick v. Cessna Aircraft Co.*, Case No. 99,987 (Kan. App. June 12, 2009)**

Morgan Hetrick designed and developed an anti-skid brake system modification for certain models of the Cessna Citation. The petition alleged Cessna fraudulently and intentionally converted Hetrick's design without compensating Hetrick. Mr. Hetrick died during he course of litigation and the Estate of Morgan Hetrick ("Estate") was substituted as the plaintiff. The Estate produced an expert report setting forth the expert's opinions regarding damages. The expert's opinion as to damages was based on the increase in value of an airplane after anti-skid brakes were installed. The district court precluded the expert's testimony on the grounds that the value of the airplane before and after the anti-skid brake modification was not a reasonable basis for calculating damages. The expert's analysis was not related to the value of the modification at the time of the alleged conversion.

The Appellate Court affirmed the district court's order granting Cessna's motion in limine to exclude the Estate's expert witness from testifying regarding his opinions as to damages. The district court did not abuse its discretion in sustaining Cessna' motion in limine to preclude the expert's opinions regarding the Estate's damages. The expert's methodology did not provide a reasonable basis for computation of damages that would enable the trier of fact to arrive at an approximate estimate of the amount of loss. The expert's opinions were too remote, speculative and conjectural to form a basis for measurement of damages.

Summary by: William F. ("Liam") Logan of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

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***In the Marriage of Lynne Singhal v. Virender Singhal*, Case No. 100,068 (Kan. App. June 12, 2009)**

The Husband appealed the district court's division of marital property on the grounds the district court abused its discretion in adopting a property valuation date. The Wife cross-appealed arguing the district court committed error in using a separate property valuation date for the marital residence and in denying her request for attorney fees. The Appellate Court affirmed the district court in all respects. The district court did not abuse its discretion in setting March 2005 as the property valuation date for the division of marital assets. As of March 2005, all attempts at reconciliation had failed and the Husband had completely moved out of the martial residence. The district court did not deviate from the March 2005 valuation date designated for all property when it placed a value on the marital home. The district court did not abuse its discretion when it considered subsequent changes in value to the marital home, as well as evidence that from March 2005 to the time the divorce decree was entered, the Husband bore the entire financial burden of paying the mortgage on the marital home. The district court did not commit error in denying the Wife's claim for attorney fees. The Wife failed to submit evidence of legal expenses incurred and her financial inability to pay such expenses, and the Wife received sufficient assets as part of the divorce to allow her to pay her own legal expenses.

Summary by: William F. ("Liam") Logan of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

***In the Matter of the Norene S. Chapman Trust*, Case No. 100,160 (Kan. App. June 12, 2009)**

Southwest National Bank, the conservator for the minor children of Thomas Chapman ("Chapman"), attempted to garnish Chapman's interest in the Norene S. Chapman Trust ("Trust"). The Trust answered the garnishment order by stating that Chapman had sold his beneficial interest in the Trust prior to the garnishment being issued. The issue was whether the sale of Chapman's interest in the Trust was valid. Southwest argued the sale was invalid because notice was not given to other beneficiaries of the Trust as required by the language of the Trust instrument. Based on its construction of the Trust instrument, the Appellate Court affirmed the opinion of the district court that the sale of Chapman's interest complied with the notice provision.

Summary by: William F. ("Liam") Logan of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

***In the Marriage of Anthony Verlinden and Jodeen Virlinden*, Case No. 100,208 (Kan. App. June 12, 2009)**

The spouse appealed the district court's denial of her motion to reconsider the division of marital assets and denial of maintenance. The Appellate Court affirmed the district court's order denying the motion to reconsider. The district court heard evidence concerning the statutory factors K.S.A. 60-1610 concerning the equitable division of martial property and did not abuse its discretion when it did not explicitly discuss each of those factors in its opinion. Given the circumstances of the case, the district court did not abuse its discretion in denying maintenance.

Summary by: William F. ("Liam") Logan of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

***In the Interest of O.O. and M.G.*, Case No. 101,366 (Kan. App. June 12, 2009)**

The Appellate Court affirmed the district court's finding that there was sufficient evidence in the record to support the conclusion that a rational factfinder would have found it highly probable, i.e. by clear and convincing evidence, that the mother's rights should be terminated, and that such termination was in the best interests of the children.

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Summary by: William F. ("Liam") Logan of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

In the Interest of D.M.M., **Case No. 101,673 (Kan. App. June 12, 2009)**

The Appellate Court affirmed the district court's order terminating the natural mother's parental rights. The following factors supported termination of the mother's parental rights: a lack of effort on the part of the mother to adjust her circumstances, conduct or condition to meet the child's needs; the mother's failure to assure care of the child in the mother's home when able to do so; and the mother's failure to carry out a reasonable plan approved by the court directed toward the reintegration of the child into the parental home. While the better practice is that the journal entry expressly reflect that the children's best interests were considered, the district court, in its findings of fact and conclusions of law, showed its consideration and concern for the best interests of the child.

Summary by: William F. ("Liam") Logan of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

<u>June 5, 2009</u>

***Holle and Clark v. Stichtenernath*, Case No. 100,109 (Kan. App. June 5, 2009)**

Background: The beneficiaries challenged the co-trustees' retention of farm land. A special master recommended sale of the farm land and investment of the proceeds. The district court approved these recommendations over the co-trustees' objections. The co-trustees of The Paul W. Holle Trust (Trust) appealed the district court's order to sell the trust property. Reversed.

Analysis: The primary objective of trust law is to carry out a settlor's intent. This intent must control unless contrary to settled principles of law. Here, the Trust language was plain and unambiguous. It provided that the co-trustees may retain trust property without respect to the rate of return.

Findings: The Trust's language, which reflects the settlor's intent, established an exception to the prudent investor rule of the Uniform Prudent Investor Act and the Restatement (Second) of Trusts § 228.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

***Cox v. Country Haven/North Point Skilled Nursing Center*, Case No. 100,533 (Kan. App. June 5, 2009)**

Background: The parties disagreed as to whether Cox required a left knee replacement as a natural consequence of her 2001 work-related injury or as a result of preexisting arthritis. The Board of Workers Compensation determined Country Haven was responsible for Cox's post-award medical treatment. Country Haven appealed. It argued Cox's post-award treatment was due to preexisting arthritis and, as such, the Board erred in holding it responsible for her post-award medical treatment. Affirmed.

Analysis: Where a preexisting condition is aggravated by an accidental injury arising out of employment, a claimant is entitled to compensation for the entire disability without apportionment. However, when a worker's preexisting conditions are aggravated by everyday activities, workers compensation benefits have been denied.

Findings: The parties previously settled the issue of whether Cox suffered a work-related injury and Cox's physicians testified her work-related injury - not her everyday activities - aggravated her preexisting condition and required replacement of her left knee. The Court of Appeals found there was substantial evidence that Cox's condition was aggravated by her work activities.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

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***King v. Avery Dennison Automotive Divisions*, Case No. 100,230 (Kan. App. June 5, 2009)**

Background: On December 18th, 2003, King injured both shoulders in a work-related injury at Avery Dennison. Initially, his right shoulder hurt more than his left. Avery Dennison closed its plant and, on December 30th, King began working for Sharpline. Here, King used his left arm more due to pain in his right shoulder, which led to a gradual worsening of his left shoulder. The Board of Workers Compensation found Avery Dennison responsible for both shoulders, including the worsening of the left. Avery Dennison appealed, arguing the Board erroneously applied the natural and probable consequence rule and ignored the last injurious exposure rule. Affirmed.

Analysis: The secondary injury rule allows a claimant to receive compensation for all of the natural consequences arising out of an injury, including any new and distinct injuries that are the direct and natural result of the primary injury. The last injurious exposure rule provides when an employee sustains a subsequent industrial injury which is found to be a "new" injury, the insurer at risk at the time of the second injury is liable for all of claimant's benefits.

Findings: After the accident, King complained of pain in both shoulders. His physicians concluded his injuries to both shoulders were causally related to the accident. The Court of Appeals held substantial competent evidence supported the Board's decision that King only suffered one injury to both shoulders, while employed at Avery Dennison. He did not sustain a new and separate injury while employed at Sharpline. The worsening left shoulder condition was the natural and probable consequence of his original injury. Affirmed.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

***In the Interest of P.H., C.N., T.N. and K.N.*, Case No. 101,761 (Kan. App. June 5, 2009)**

Background: The Mother appealed the District Court's order terminating her parental rights. The District Court found that despite the efforts of the Department of Social and Rehabilitation Services ("SRS") to reintegrate the family, the Mother had made little effort to adjust her circumstances and conduct to meet the needs of her child. In addition, during the pendency of the case, the Mother pled guilty to two counts of aggravated robbery and was subsequently sentenced to 49 months in prison. Affirmed.

The District Court did not commit error in terminating mother's parental rights. Given the facts in the record, a rational fact finder could have found by clear and convincing evidence that the Mother's rights should be terminated. Given the length of time the children would be in SRS custody and the length of time Mother was going to be in prison, termination of the Mother's parental rights was in the best interests of the children. The best practice is for the trial court to set out in one journal entry the findings of fact and conclusions of law in ruling on a motion to terminate parental rights, leaving the parties no doubt about the finality of the order and thus establishing the requisite time limits for appeal.

Summary by: William F. ("Liam") Logan of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

***Alfani v. Kansas Department of Social and Rehabilitation Services*, Case No. 100,770 (Kan. App. June 5, 2009)**

Background: Kansas Department of Social and Rehabilitation Services ("SRS") alleged Alfani received more cash assistance and food stamps than he was entitled to. An administrative law judge found in favor of SRS and ordered the Appellant to repay the amount through a set off program. The Appellant's subsequent petition for judicial review of the ALJ's order was dismissed as untimely. The Appellant then filed a petition in District Court alleging SRS acted improperly in attempting to garnish his wages as a setoff for the amount due under the ALJ's order. The District Court dismissed the Appellant's Petition. Affirmed.

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The District Court correctly held that res judicata barred consideration of the legality of the debt owed by the Appellant to SRS. The Kansas Act for Judicial Review and Civil Enforcement of Agency Actions ("KJRS") is the exclusive means by which the Appellant can raise challenges to the collection efforts of SRS.

Summary by: William F. ("Liam") Logan of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

Waggoner v. Lambert, Case No. 99,138 (Kan. App. June 5, 2009)

The District Court denied the Appellant's motion to reduce child support. Affirmed. While there was a material change in circumstances, namely a change in the Appellant's employment and a substantial decrease in Appellant's income, the court did not commit error in denying the motion. There was sufficient evidence to support the Court's conclusion that the Appellant was voluntarily underemployed. Where a noncustodial parent voluntarily changes jobs, the court must balance the legitimate interest of the parent to pursue other employment and business opportunities with the interests of the minor children in having a standard of living consistent with the one they have had for several years. The Appellant's child support obligation outweighed his right to voluntarily terminate his prior employment.

Summary by: Liam Logan of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

May 29, 2009

Duvvurs v. Freeman, Case No. 99,332 (Kan. App. May 29, 2009)

Plaintiffs purchased their home from Defendants in August 5, 2005. Shortly after taking possession, Plaintiffs learned the finished basement was prone to flooding - a fact known by Defendants. Plaintiffs sued Defendants for rescission of the sales contract. The trial court granted judgment in favor of Plaintiffs. Defendants appealed. Both parties appealed the trial court's judgment regarding prejudgment interest.

Fraud: Prior to closing, Defendants only disclosed one of two known problems, causing the water intrusion. Defendants blamed the flooding on a remediable problem and failed to disclose another known problem (grading issues). ***Held:*** A rational factfinder could have found it highly probable that Defendants committed fraud by both affirmative misrepresentation and by silence. Point denied.

Rescission: A plaintiff seeking rescission may support their claim by establishing an offer has been made to restore the consideration. ***Held:*** Plaintiffs offered and demanded to restore the house by a letter on August 21, 2005. Point denied.

Mitigation: Plaintiffs moved out of the house on September 3, 2005; yet, Plaintiffs continued to maintain the home until March 2008. Defendants argued Plaintiffs should have leased the house after they vacated it. ***Held:*** Leasing the house would have been inconsistent with Plaintiff's rescission claim. Defendants did not meet their burden of proving a failure to mitigate damages.

Prejudgment Interest: Plaintiffs argued they were entitled to prejudgment interest on the $600,000 awarded to them for the price of the home. ***Held:*** The record on appeal and trial court's findings were inadequate to establish the details of the financing and, therefore, what prejudgment interest might have been due to Plaintiffs. Plaintiffs bore the burden of proof and, as such, point denied.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C. ▲

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Application for Membership

The undersigned hereby makes application for membership in the Kansas Association of Defense Counsel and submits the following information in connection therewith (membership restricted to an individual)

1. Name _____
   (Last Name) (First Name) (Middle Initial)
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4. Send correspondence to: ☐ Office ☐ Residence
5. Date admitted to the Bar in the State of Kansas _____
6. Are you a member of the Defense Research Institute (DRI)? ☐ Yes ☐ No
7. List names of and year of admission of all courts of last resort in which you are admitted to practice: _____
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9. State all legal and public offices held: _____
   _____
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    _____
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When completed, this application, together with admission and initiation fee, should be mailed to the Kansas Association of Defense Counsel,
825 S. Kansas Ave., Suite 500
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